

INDEX

SUBJECT INDEX

	Page
Petition for writ of certiorari	1
Orders and judgment below.....	1
Summary and short statement of matter involved	2
Jurisdiction	5
Questions presented	6
Reasons for allowance of the writ.....	7
Prayer for writ	8
Brief in support of petition.....	9
Report of opinion	9
Basis of jurisdiction	9
Statement of the case.....	10
Specifications of error.....	10
Argument	11
Constitutional jury; waiver in criminal case involving capital punishment; conditions of waiver	11
Venue is a jurisdictional fact; Must be proved beyond all reasonable doubt; must exclude every reasonable hypothesis except that the offense was committed in the county alleged	16

TABLE OF CASES CITED

<i>Brown v. Mississippi</i> , 297 U. S. 278, 56 Sup. Ct. 461, 80 L. Ed. 682	5
<i>Clark v. State</i> , 55 Ga. App. 162	20
<i>Grovey v. Townsend</i> , 295 U. S. 45, 55 Sup. Ct. 622, 79 L. Ed. 1292, 97 A. L. R. 680	5
<i>Hollins v. Oklahoma</i> , 295 U. S. 394, 55 Sup. Ct. 784, 79 L. Ed. 1500	5
<i>Johnson v. State</i> , 16 Ala. App. 64, 75 So. 270	16
<i>Johnston v. Zerbst</i> , 304 U. S. 458	16
<i>Norris v. Alabama</i> , 294 U. S. 587, 55 Sup. Ct. 579, 79 L. Ed. 1074	5

	Page
<i>Patterson v. Alabama</i> , 294 U. S. 600, 55 Sup. Ct. 575, 79 L. Ed. 1082	5
<i>Patton v. United States</i> , 281 U. S. 276	7, 12
<i>Powell v. Alabama</i> , 287 U. S. 45, 53 Sup. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527	5
<i>Snyder v. Commonwealth of Massachusetts</i> , 291 U. S. 97, 54 Sup. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575	5
<i>Thompsett v. Ohio</i> , 146 F. (2d) 95	8
<i>Thompson v. Utah</i> , 170 U. S. 343	8, 11

STATUTES CITED

Code of Georgia, Annotated:

Section 2-102	3
Section 2-103	3
Section 2-4306	4
Section 2-4601	3

Constitution of Georgia:

Article I, Section I, Paragraph II	6, 7
Article I, Section I, Paragraph III	6, 7
Article VI, Section XVI, Paragraph VI	4, 7
Article VI, Section XVIII, Paragraph I	6

Constitution of the United States:

Sixth Amendment	11
Fourteenth Amendment	7

**United States Code Annotated, Title 28, Section
344b (Judicial Code, Section 237b, as amended by
the Act of February 13, 1925)**

5

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

No. 456

ALFRED HANS WEISS,

Petitioner,

vs.

JOHN W. HOOD, *WARDEN*

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF GEORGIA**

To the Supreme Court of the United States:

Petitioner, Alfred H. Weiss, prays that a writ of certiorari be issued to review the final judgment of the Supreme Court of the State of Georgia, the highest court in said State in which a decision could be had, affirming the order and judgment of the lower court, namely, Superior Court of Cobb County, Georgia, denying petitioner's release on writ of *habeas corpus* and remanding petitioner to custody of respondent.

Orders and Judgment Below

The order and judgment of the Superior Court of Cobb County is shown in the record at page ten and the order and judgment of the Supreme Court of Georgia affirming

the order and judgment of the lower court was entered on May 7, 1946 (R. 83, 84) and order denying motion for rehearing entered June 6, 1946 (R. 87).

Summary and Short Statement of Matter Involved

Petitioner, at all times in this case involved, was a citizen and resident of the State of North Carolina, but was lately indicted, tried and convicted in the Superior Court of Cobb County, Georgia, on a charge of murder, and by reason of a mercy clause in the verdict was sentenced to be confined at hard labor in the Penitentiary of the State of Georgia, or at such other places as the Department of Corrections of said State may direct, for and during his natural life (R. 78-9).

His mother through a young and inexperienced lawyer of the North Carolina Bar retained Messrs. L. N. Blair and James V. Carmichael, lawyers of the local Cobb County Bar, to defend petitioner on his trial, and also to prosecute an appeal to finality, if one should be necessary. They were fully paid the agreed fee (R. 59), but after return of the jury's verdict, said counsel failed and neglected to file a motion for a new trial, or a motion in arrest of judgment, and wholly failed to perfect and prosecute an appeal.

Petitioner relying on his counsel, as he had a right to do, did not become aware of the abandonment of his case by his counsel until the time within which to file a motion for new trial and also to prosecute an appeal had expired.

Being then without remedy save only by way of a writ of *habeas corpus*, he petitioned for the writ in the Superior Court of Cobb County, Georgia (R. 4, 55), alleging that he was unlawfully deprived of his liberty and denied his rights to due process of law and equal protection of the laws as required by the due process of law and equal pro-

tection of the laws clauses of the Fourteenth Amendment to the Constitution of the United States, which provide:

" . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (R. 5, 6, 56),

for the following reasons:

(1)

That he was not afforded a trial by jury as required by the Constitution of the State of Georgia, namely Article VI, Section XVIII, Paragraph I, which provides:

"The right of trial by jury, except where it is otherwise provided in this Constitution, shall remain inviolate, but the General Assembly may prescribe any number, not less than five, to constitute a trial, or traverse jury, except in the Superior & City Courts," (R. 5), (See Section 2-4601, Code of Georgia, Annotated, page 314),

he having been tried before only eleven jurors instead of the Constitutional number of twelve intelligent and upright jurors (R. 4, 5), and which also was a denial of due process of law as provided in Article I, Section I, Paragraph III, of the Constitution of the State of Georgia, which reads:

"No person shall be deprived of life, liberty, or property, except by due process of law.", (R. 56) (See Section 2-103, Code of Georgia, Annotated, page 76)

and which was also a denial of his rights to equal protection of the laws as required by Article I, Section I, Paragraph II, of the Constitution of the State of Georgia, which reads:

"Protection to person and property is the paramount duty of Government, and shall be impartial and complete," (R. 56), (See Section 2-102, Code of Georgia, Annotated, page 70).

(2)

That the Superior Court of Cobb County, Georgia, the Court in which the petitioner was tried, convicted and sentenced, had no jurisdiction in the premises for the reason that the evidence adduced upon the trial of the defendant failed to show that the crime was committed in Cobb County, Georgia, as required by Article VI, Section XVI, Paragraph VI, of the Constitution of the State of Georgia, which reads:

" . . . , and all criminal cases shall be tried in the County where the crime was committed, except cases in the Superior Courts where the Judge is satisfied that an impartial jury cannot be obtained in such county." (R. 6), (See Section 2-4306, Code of Georgia, Annotated, page 306).

The record shows that the defendant was ignorant of his rights, unacquainted with the proceedings in the criminal trial against him, and that he did not intelligently, competently, nor expressly waive or consent to a waiver of his rights to a Constitutional jury of 12 jurors (R. 57-60), but that the Court, without the express consent of the defendant, without consulting with the defendant, without any inquiry or judicial consideration as to whether the defendant understood the proceedings and was competently and intelligently able to waive said constitutional rights, and without at least one of the defense counsel then and there present in open court being informed, caused the Clerk of the trial court to make a memorandum on the back of a list of the veniremen in words and figures the following: "Verbal agreement for trial with eleven men on the panel" (R. 82).

The Superior Court of Cobb County, after hearing and considering the writ of habeas corpus, denied petitioner relief sought and remanded him to the custody of respondent

(R. 7). Petitioner then took this case to the Supreme Court, State of Georgia, on a Bill of Exceptions (R. 1-3), which court, after hearing and considering the matter, affirmed the decision and order of the lower court (R. 83-85). Petitioner filed his motion for rehearing (R. 85-87), which motion was denied (R. 87).

Jurisdiction

The jurisdiction of this Court is invoked under Section 344-B, Title 28, U. S. C. A. (Judicial Code, Section 237-B as amended by the Act of February 13, 1925).

The petitioner alleges a violation and denial of his rights under the due process of law and equal protection of the laws clauses of the Fourteenth Amendment of the Constitution of the United States, and certiorari has issued to inquire into claims of denial of procedural process and equal protection in criminal cases in the State Courts, see:

- Snyder v. Commonwealth of Massachusetts*, 291 U. S. 97, 54 S. Ct. 330, 78 L. Ed. 674, 90 A. L. R. 575;
- Powell v. State of Alabama*, 287 U. S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A. L. R. 527;
- Norris v. Alabama*, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074;
- Patterson v. Alabama*, 294 U. S. 600, 55 S. Ct. 575, 79 L. Ed. 1082;
- Hollins v. Oklahoma*, 295 U. S. 394, 55 S. Ct. 784, 79 L. Ed. 1500;
- Brown v. Mississippi*, 297 U. S. 278, 56 S. Ct. 461, 80 L. Ed. 682;
- Grovey v. Townsend*, 295 U. S. 45, 47, 55 S. Ct. 622, 79 L. Ed. 1292, 97 A. L. R. 680.

Petitioner alleges that the State Court (Georgia) has decided a Federal question of substance in a way probably not in accord with applicable decisions of this Court.

Questions Presented

(1)

Is a defendant in a capital felony trial in a State Court (Georgia) denied his right to due process of law and equal protection of the laws as required by the "Due Process of Law" and "Equal Protection of the Laws" clauses of the 14th Amendment to the Constitution of the United States when Article VI, Section XVIII, Paragraph I, of the Constitution of the said State (Georgia) provides that:

" . . . the right of trial by jury except where it is otherwise provided in this Constitution shall remain inviolate. . . ."

and a trial by jury within the purview of said Section of the Constitution of the State of Georgia requires that such trial shall be before twelve intelligent and upright jurors and said defendant is afforded a jury trial by only eleven jurors, and it appears that the defendant was ignorant of his rights, unacquainted with proceedings in a criminal trial, and did not intelligently, competently nor expressly waive or consent to a waiver of said rights (R. 57-58), and Article I, Section I, Paragraph III of the Constitution of the State of Georgia provides:

" . . . no person shall be deprived of life, liberty or property except by due process of law * * * ",

and Article I, Section I, Paragraph II, of the Constitution of the State of Georgia provides:

" . . . protection to person and property is the paramount duty of Government, and shall be impartial and complete . . . ?"

(2)

Is a defendant in a capital felony trial in a State Court, denied his rights to due process of law and his rights to equal protection of the laws as required by the "Due Process of Law" and "Equal Protection of the Laws" clauses of the 14th Amendment to the Constitution of the United States when Article VI, Section XVI, Paragraph VI, provides:

" . . . all criminal cases shall be tried in the county where the crime is committed. . . ."

and the record of the trial fails to show that the petitioner committed the alleged capital felony for which he was tried, convicted and sentenced in the County of Cobb, State of Georgia; namely, the jurisdiction of said Court, and Article I, Section I, Paragraph III of the Constitution of the State of Georgia which provides:

" . . . no person shall be deprived of life, liberty or property except by due process of law. . . ."

and Article I, Section I, Paragraph II of the Constitution of the State of Georgia provides:

" . . . protection to person and property is the paramount duty of Government, and shall be impartial and complete . . . ?"

Reasons for Allowance of the Writ

Rights, privileges, and immunities guaranteed to petitioner by the provisions of the "Due Process of Law Clause" and Equal Protection of the Laws Clauses of the 14th Amendment to the Constitution of the United States were denied to him in a capital felony case. The Supreme Court of the State of Georgia has decided Federal questions of substance, and probably not in accord with decisions of this Court as shown in *Patton v. United States*, 281 U. S. 276;

Thompson v. Utah, 170 U. S. 343; *Thompsett v. State of Ohio*, 146 Fed. Second 95.

That the Supreme Court of the State of Georgia has also overlooked the express requirements laid down in Mr. Justice Sutherland's opinion, in *Patton v. United States, supra*, to constitute a valid waiver of a jury in a felony case, and has thereby enlarged the force and effect of the case of *Patton v. United States, supra*, away and beyond the force and effect intended by this Court to the manifest wrong and injury of the petitioner, and also overlooked the decision in the case of *Thompsett v. The State of Ohio, supra*, in regard to a defendant who was ignorant of his rights and unacquainted with the course of proceedings in his criminal trial.

Prayer for Writ

Conclusions

For the reasons stated, it is respectfully submitted and prayed that the petition for Writ of Certiorari be granted.

PAUL CRUTCHFIELD,
JAMES R. VENABLE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1946

No. 456

ALFRED HANS WEISS,

Petitioner,

vs.

JOHN W. HOOD, WARDEN

BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI

I

Report of Opinion

The opinion of the Supreme Court of the State of Georgia (R. 83-84). Petition for rehearing denied (R. 87).

II

Basis of Jurisdiction

A statement of the basis of jurisdiction is made in the petition preceding commencing at page 5.

III

Statement of the Case

A statement of the case is made in the petition preceding commencing at page one.

IV

Specifications of Error

The Supreme Court of Georgia erred:

(1)

In holding, in view of the evidence introduced in the *habeas corpus* proceeding, the claim of petitioner that he had been deprived of his constitutional right to a jury trial is without merit.

(2)

In failing to find that all the evidence adduced on petitioner's criminal trial did not establish venue as a jurisdictional fact, and that the sentence of petitioner was void.

(3)

In affirming the order of the Superior Court of Cobb County, Georgia, denying the petitioner's release on the writ of habeas corpus and remanding the petitioner to the custody of respondent when the evidence showed that the petitioner was ignorant of his constitutional right and did not competently, intelligently and/or expressly waive or consent to a waiver of his constitutional rights to a trial by a jury of twelve jurors.

(4)

In affirming the order and decision of the Superior Court of Cobb County, Georgia, and holding that the said Superior Court had jurisdiction of petitioner's criminal trial when

there was no evidence adduced on the trial of the case to show that the alleged crime was committed in Cobb County, Georgia, within the jurisdiction of said court, and Article VI, Section XVI, Paragraph VI, of the Constitution of the State of Georgia, provides:

" . . . all criminal cases shall be tried in the County where the crime was committed . . . "

V

ARGUMENT

Constitutional Jury; Waiver in Criminal Case Involving Capital Punishment; Conditions of Waiver

By common law petitioner could be tried only before a jury of 12 men, no more and no less, and he was without power to waive a common law jury; and this was also the law in the Federal Courts under the Sixth Amendment to the Constitution and as well in those States, whose constitutions provide that the right of trial shall be, or remain, inviolate.

Thompson v. State of Utah, 170 U. S. 343.

The Constitution of the State of Georgia perpetuated the common law jury of 12 men, no more and no less:

"Right of trial by jury; The right of trial by jury, except where it is otherwise provided in this Constitution, *shall remain inviolate* (Italics ours), but the General Assembly may prescribe any number not less than five, to constitute a jury, *except in the Superior & City Courts.*" The Constitution of the State of Georgia: Code Section 2-4601 (6545) Par. 1.

There is no contrary provision elsewhere in the Constitution of the State of Georgia; and there is no Act of the General Assembly purporting to alter the requirements of the Constitution.

In the case of *Patton v. United States*, 281 U. S. 276, this court held substantially:

" . . . before any waiver can become effective the consent of government counsel and the sanction of the Court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter or rote, but with sound and advised discretion, with an eye to avoid unreasonable and undue departures from the mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

The record made in the criminal trial was a mere memorandum written on the back of a copy of the veniremen list, and afterward transcribed into the minutes of the trial court; the evidence of the Clerk of the trial court:

" . . . As to where I got this language, 'verbal agreement for trial with eleven men on the panel,' that was agreed to by the attorneys . . . it is written on the jury list . . . I don't remember now who made the announcement, which counsel . . . I got the information to write these minutes from the original, from the jury list . . ." (R. 63-64).

The State introduced in evidence that part of the minutes reading as follows:

"Verbal agreement for trial with eleven men on the panel." May 8, 1944, in Book MN, page 489.

There was no other, additional or different record made, and from aught that appears there was no agreement of the prosecutor, no sanction of the judge, with caution proportionate to the gravity of the case, and no express and intelligent consent of the defendant.

The fair inference to be drawn from the whole of Mr.

Justice Sutherland's Opinion, in the case of *Patton v. United States*, is that the "old rule" (the common law rule perpetuated by the 6th Amendment to the Constitution of the United States and by those Constitutions of the several States where it is provided the right of trial by jury shall remain inviolate) should apply in any case where a common law restraint continued in force and effect.

The testimony of witnesses on the *habeas corpus* proceeding cannot alter or vary the record, and that record being insufficient in law to establish a valid waiver under the principles laid down in the opinion of this Court in the case of *Patton v. United States, supra*, there can be no valid waiver under the "new rule" announced in that opinion.

Indeed, it is not altogether clear that this court intended the "new rule" to apply to capital felony cases, and there is strong inference that it did not, but if on a further defining of principle involved it might be the opinion of this Court that the new rule might apply in a capital felony case, then surely this Court will in the light of its reasoning in the *Patton* case, *supra*, require a rigid adherence to the rule of sound and advised judicial discretion, and that this be shown affirmatively of record. This court in so grave a departure from the established mode of trial in criminal cases will certainly not tolerate "the mere matter of rote" consideration shown in the instant case.

But also, the evidence received on the trial of petitioner's *habeas corpus* proceeding: the trial was conducted by two local attorneys and their assistant for the defendant, with Allan Brombacher, a member of the North Carolina bar, sitting in at the table; and the Solicitor General of the Blue Ridge Circuit appeared for the respondent. These men, the petitioner, his mother, the Clerk of the Court, and a witness named Austin E. Hogsed, testified. The

testimony of the Solicitor General (R. 65-67) informs only that one of the local counsel conferred with him during the selection of the jury on the proposition of going to trial with only eleven men on the jury panel; that he agreed, and that the local counsel thereupon made the announcement.

As is usual in such a case, the testimony of petitioner (R. 57-58, 74-75) shows the two local lawyers sat at the head of the defense table. Back of them sat Mr. Brombacher, the North Carolina lawyer, and back of him sat petitioner. At the end of the table the assistant of the local lawyers, Mr. Schroeder, sat. The local lawyers were selecting the jury. One of the local lawyers thought very strongly that he and his law partner were in charge of the trial, and that their decisions in the matter of the jury were controlling and binding upon the defendant; his testimony:

"I don't know that it was any one's suggestion that we go to trial with eleven men on the jury . . . it was a proposition of going to trial with eleven jurors or having to take a juror that might not be favorable to us, and Mr. Blair went over to . . . Mr. Vandiver, and they talked among themselves . . . As to whether or not I am sure that I talked with the defendant and explained to him his rights to be tried with eleven jurors instead of twelve . . . that is not the question." (NOTE: he wholly failed to recognize the rights of the defendant.) ". . . There was no question but what the defendant knew about it; the whole question was whether or not to call another panel or proceed with eleven jurors . . . I told him that . . ." (R. 73).

It was not a question for the lawyer alone to determine. This lawyer could not conceive the client in a criminal case having any power in the direction of his case. The court

should have followed the procedure as outlined in the case of *Patton v. United States, supra*.

Exactly similar testimony was given by the other local attorney.

Here is a matter so grave there was no procuring the defendant's expressed and intelligent consent. No, counsel ran the trial; their judgment was supreme even in matters so grave as departing from the established mode of trial; and the defendant was ignored.

And this is further corroborated by the testimony of the assistant to local counsel; his testimony:

" . . . I did not hear him (leading local counsel) go over to the Solicitor General and make that announcement (agreement to stand trial with eleven men on the jury panel) . . . frankly I don't think that one of the attorneys said anything (before the announcement) about the case being tried with less than twelve jurors. I never heard him (petitioner here) agree to try the case with eleven jurors in open court . . . "

and out of sequence:

" . . . I assisted in selecting the jury in this case" (R. 67).

It is respectfully pointed out that Messrs. Blair & Carmichael, and their assistant, Mr. Schroeder, were witnesses for the Respondent, and certainly their testimony does not support the proposition that they, or either of them, informed the defendant of his constitutional rights, or that the court obtained from defendant the express and intelligent consent required by the Opinion in the case of *Patton v. United States, supra*.

Moreover, the seating arrangement at the defense table, with the defendant seated between Alan Brombacher and Mr. Schroeder, and Mr. Schroeder testifying that nothing was said by the local defense lawyers about standing trial

before a jury of only eleven jurors lends the strongest corroboration to the testimony of the petitioner and Alan Brombacher, his North Carolina lawyer, who both testified they heard and knew nothing of the proposal to stand trial before a jury of less than twelve men (R. 67-69, 60-62).

The Specifications of Errors ought to be sustained by the opinion of this Honorable Court.

Venue Is a Jurisdictional Fact; Must Be Proved Beyond All Reasonable Doubt; Must Exclude Every Reasonable Hypothesis Except That the Offense Was Committed in the County Alleged.

Venue is a jurisdictional fact, and the term 'jurisdiction' as applied to criminal courts, means power to hear and determine. In the instant case, the jury's verdict was for lack of venue a nullity, and the sentence of the court is void.

Johnson v. State, 16 Ala. App. 64, 75 So. 270, —.

A court having jurisdiction to entertain a petition for a writ of *habeas corpus*, has jurisdiction on *habeas corpus* to inquire into the jurisdiction of the trial court both as to the subject matter and the person, and to receive evidence outside of the record but not inconsistent with the record.

In the case of *Johnston v. Zerbst*, 304 U. S. 458, the Opinion by Mr. Justice Black, the Court held:

"The scope of inquiry in *habeas corpus* proceedings has been broadened—not narrowed—since the adoption of the Sixth Amendment. In such a proceeding it would clearly be erroneous to limit the inquiry to the proceedings and judgment of the trial court, and the petitioned court has power to inquire with regard to the jurisdiction of the inferior court, either in respect to the subject matter or to the person, even if such inquiry involves an examination of facts outside of, but not inconsistent with the record" (pp. 465-466).

There was special reason why the Supreme Court of Georgia ought to have scrutinized the transcript of evidence heard in the criminal case: two of its highest officers, i. e., attorneys representing the defendant, retained and fully paid both for the trial and an appeal, if one became necessary, after verdict abandoned the defendant's cause, and made representations not tenable in law or fact as excuse for not proceeding with a motion for new trial and prosecution of an appeal, thereby inducing the defendant (petitioner here) to believe his rights were safeguarded, though they were in jeopardy, until the time for both the motion and an appeal had expired, and petitioner was without any other adequate remedy save only a petition for writ of *habeas corpus*.

The judiciary is a part of the State. Its attorneys are the highest officers of its courts; for judges are changing bodies of men, while the bar goes on to the end. And it is unconscionable that the State might gain an ascendancy over its citizen by the culpable neglect of one of its officers, and foreclose the citizen of all remedy. The offense is doubly great when the victim is a citizen of a sister State, without knowledge of local laws governing trial and procedure.

The evidence on the criminal trial respecting venue was: the defendant's wife had abandoned her husband and children in North Carolina, and he came to induce her to return, visiting her at the home of a sister, in Marietta, Georgia. That he took his wife and a little niece out for an automobile ride at between 2:30 and 3:00 o'clock in the afternoon (R. 34). A witness fixes the time his wife was first observed shot at 3:30 P. M. (R. 14). This was on the highway between Marietta and Atlanta, just a short distance from the County line in Cobb County. He (petitioner) with his wife beside him in his automobile pulled into a filling station

at about 3:30 P. M. The exact location of the filling station is not fixed in the record. Scrutinizing all of the evidence, it is impossible to fix the location. The very best that can be said as to its location is that it is so close to the County line between Fulton County and Cobb County as to be not more than a few hundred yards from the line. There is not one word in the record that fixes the location where the deceased had been shot.

Major C. H. Millans, Deputy Director of the Department of Public Safety, the Georgia State Patrol, testified;

"On . . . April 19th, I went to the Crawford W. Long Hospital (to take the statement of petitioner's wife before her death) . . . As To Whether That Was in Marietta—She Didn't Know Where She Was Shot" (R. 38-39).

Major Millans testified also:

"The way she told me was that when they left the house they were going to Marietta to get lunch . . . I understood that it was on that trip that she was shot . . ." (R. 40).

But in that, Major Millans was manifestly confused, or Mrs. Alfred Weiss, the wife of petitioner, was confused, because Mrs. Grace Cabe, the sister of Mrs. Weiss, and from whose home she left to get a meal at a restaurant in Marietta, and to which she returned, and then again left in company of the defendant, testified:

"Mrs. Weiss was a sister of mine . . . I was living at that time (time of shooting) in Marietta. I was living with her at the time my sister was shot . . . I was at home when Mr. Weiss came there . . . He first came to my house about 10:30. His wife, my sister, was there. He had a conversation with my sister there at that time . . . I don't hardly remember how long they did talk at my home after that

before they went away, about forty-five minutes, I guess, or an hour . . . He said he hadn't eaten anything that morning, and she finally came down town with him . . . I would say they were gone up town about an hour, I guess. He made a suggestion or request that he go with my sister to Atlanta that afternoon. . . . As near as I can recall, they left between 2:30 and 3:00 o'clock . . ." (R. 33-34).

And on cross-examination, she testified:

"I say that Mr. Weiss came to my house about 10:30 that Tuesday morning, and he came for the purpose of getting his wife and carrying her back home, taking her back to his home and the home where their three small children were . . . I didn't hear her say at any time that she wasn't going back with him, if she did say it. They talked on quite a little bit there and left together to come down town to get lunch. They stayed there at the house before they came to Marietta about forty-five minutes, I guess. And then when they came back they were . . . in good humor with each other . . . They stayed there . . . until something like three o'clock, when they left . . . They were going down (to Atlanta) and meet my other sister late in the afternoon . . . I consented to let my child go along with them just because she wanted to go." (R. 35-38).

In the light of the sister's testimony, *supra*, it is manifestly impossible that so much of Major Millan's testimony as tended to show the defendant and his wife were enroute to a restaurant in Marietta for lunch is correct, and it is certainly the result of confusion. It is impossible to infer venue in or near Marietta, while enroute to a restaurant for lunch, on this testimony.

Petitioner and his wife left the home of her sister in Marietta, in Cobb County, Georgia, with the expressed intention of going to Atlanta, in Fulton County, Georgia; and there is nothing in the record upon which it can be inferred

the crime was committed in Cobb County, and from the evidence it is equally possible that the shooting took place in Fulton County.

In the case of *Clark v. State*, 55 Ga. App., page 162, the court held:

"Venue may be proved by circumstantial evidence; but circumstances which show that it is possible that an alleged crime was committed within the jurisdiction of the court are insufficient to establish the jurisdictional element of venue, where from the circumstances adduced it is as possible and reasonable that the crime was committed beyond the jurisdiction of the court."

The established facts may be summarized: Petitioner took his wife and infant niece out for a ride at 2:55 P. M., the party expressing their intention of going to Atlanta, in Fulton County, Georgia. At 3:30 P. M., petitioner drives his automobile into a filling station then and there asking for directions to the nearest hospital in Atlanta. He drove a short distance, and was stopped by two highway police, who escorted him to the Crawford W. Long Hospital in Atlanta, Fulton County, Georgia. The day following one of these officers attempted to secure the statement of petitioner's mortally wounded wife, and the important element of her statement on venue was: she did not know where (at what location) she was shot.

There is no other or different evidence in the record. There is no evidence from which a reasonable hypothesis can be drawn that the venue of the offense is in Cobb County; and it is as reasonable to believe the crime was committed in Fulton County. It was possible that in 35 minutes elapsing between leaving the home of Mrs. Weiss' sister and the time petitioner was first seen with his wife slumped in the front seat that he had driven in and half way across Fulton County, Georgia, and because of their announced

destination it is reasonable to think that in 35 minutes time they had passed out of Cobb County from Marietta into Fulton County into considerable depth, in excess of 15 miles, whereas, the distance from Marietta to the Fulton County line enroute to Atlanta is less than 15 miles.

Venue was not proven.

Conclusions

For the reasons stated, we respectfully submit that the judgment of the Supreme Court of the State of Georgia should be reversed.

PAUL CRUTCHFIELD,
JAMES R. VENABLE,
Counsel for Petitioner.

(5759)